



CITY COUNCIL AGENDA REPORT

MEETING DATE: MARCH 27, 2012

ITEM NUMBER: 1

SUBJECT: RETENTION OF JONES DAY FOR LEGAL SERVICES

DATE: MARCH 26, 2012

FROM: CITY ATTORNEY'S OFFICE

PRESENTATION BY: THOMAS P. DUARTE, CITY ATTORNEY

FOR FURTHER INFORMATION CONTACT: Thomas P. Duarte, 714-446-1400

RECOMMENDATION:

Authorize the City Attorney to execute the Engagement Letter (Attachment 1) with Jones Day for legal services in connection with the Petition for Writ of Mandate filed by the City Clerk ("Clerk") in *Julie Folcik v. Orange County Registrar of Voters, and Neal Kelley, Registrar of Voters* (Case No. 30-2012-00553905) ("Suit").

BACKGROUND:

On March 6, 2012, City Council directed the submission of a ballot measure regarding a proposed charter to the Orange County Registrar of Voters. This submission was due on March 9, 2012, but the OC Registrar of Voters allowed for the submission of certain parts of the ballot measure package on March 12, 2012. Due to some confusion in communication, the complete ballot measure package was inadvertently not submitted, and the complete submission did not occur until March 12, 2012. At that time, the Registrar of Voters promptly rejected the ballot measure package.

City CEO Tom Hatch directed the City Attorney to initially engage the services of Jones Day, on behalf of the Clerk, for the purpose of ensuring that the ballot measure package is accepted by the Registrar of Voters. On March 14, 2012, Jones Day, on behalf of the Clerk, filed a Petition for Writ of Mandate asking the Court to order the Registrar of Voters to accept the ballot measure package. It is worth noting that, at this time, the Registrar of Voters has chosen to not oppose the Petition for Writ of Mandate. Further, several city residents have filed applications requesting the court's permission allowing them to intervene. Jones Day has also responded to and opposed those requests.

In order to permanently engage the services of Jones Day for the duration of this Suit, it is necessary for City Council to authorize the City Attorney to execute, on behalf of the City, the Engagement Letter.

ANALYSIS:

The Engagement Letter outlines the scope of Jones Day's representation of the City in this matter. Essentially, Jones Day is only representing the Clerk in litigating the Petition for Writ of Mandate filed by Jones Day on behalf of the Clerk, including any appeals. Any representation beyond that scope will require Jones Day's agreement. Jones Day will charge the City a \$495.00 an hour fee for all attorneys who work on this matter. Jones Day issues periodic billing statements (generally, monthly) that are due and payable upon presentation. In this instance, Jones Day has waived an initial retainer that is applied to any unpaid fees, disbursements, or charges. Note that this fee does not include any costs that Jones Day may incur and Jones Day will require City reimbursement for such costs. Finally, the City Attorney will be the primary point of contact for Jones Day in this matter.

ALTERNATIVES CONSIDERED:

The Council could choose not to approve the Engagement Letter, in which case, Jones Day's work on behalf of the Clerk would not commence and continue beyond the City CEO's initial authorization.

FISCAL REVIEW:

The potential fees to be paid to Jones Day are charged at \$495.00 an hour. Because their representation of the Clerk has not yet fully commenced or completed, the total costs associated with this Engagement Letter are unknown at this time.

LEGAL REVIEW:

The City Attorney's office has reviewed and approved the Engagement Letter as to form.

CONCLUSION:

Council is requested to approve the Engagement Letter and authorize the City Attorney to sign it on behalf of the City, and authorize the City CEO to pay any attorneys' fees and costs billed by Jones Day in connection with the Suit.



THOMAS R. HATCH
Chief Executive Officer



THOMAS P. DUARTE
City Attorney

JONES DAY

3181 MICHELSON DRIVE • SUITE 800 • IRVINE, CALIFORNIA 92612
TELEPHONE: (949) 851-3939 • FACSIMILE: (949) 553-7539

Direct Number: (949) 553-7516
javogt@jonesday.com

March 14, 2012

VIA E-MAIL AND U.S. MAIL

Thomas P. Duarte, Esq.
City Attorney
City Clerk
3777 North Harbor Boulevard
Fullerton, California 92835

Re: Engagement Letter

Dear Mr. Duarte:

This letter confirms the scope, terms and conditions of our engagement by the City Clerk of the City of Costa Mesa in her official capacity ("City Clerk") with respect to the filing and prosecution of a petition for writ of mandate on her behalf against the County of Orange to enable Costa Mesa's proposed charter to be placed on the June 2012 election ballot, as well as any appeals (the "Action"). Thank you for retaining Jones Day in this engagement, and for your consideration and cooperation concerning the matters covered in this letter.

1. Limited Scope of Engagement and Client Relationship

The City Clerk has asked us to represent it in the Action. Any new or expanded engagement beyond that described above will require our agreement. Similarly, except as expressly set forth in this letter, any representation in this engagement of any person or entity other than the City Clerk will require our agreement. That is, our client is, and we are entering into an attorney-client relationship with the City Clerk. We do not and cannot guarantee an outcome in the Action. We are being retained after the County of Orange's Registrar of Voters rejected the City Clerk's request to include the proposed charter on the June 2012 ballot, and we do not and cannot guarantee that we will be able to have this decision reversed by mandamus.

2. Staffing

You have designated yourself as the person from whom we will take direction and to whom we will report in connection with this engagement. I will have primary responsibility for this engagement and will be assisted by such other lawyers and service personnel as I deem appropriate from time to time in order to provide high quality services in a cost-efficient manner.

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I will be the Partner generally responsible for Jones Day's representation of the City Clerk, including matters related to billing and staffing.

3. **Potentially Adverse Representations or Conflicts of Interest; Advance Waiver**

Jones Day represents and in the future will represent many other clients. Some may be direct competitors of the City of Costa or otherwise may have business interests that are contrary to the City Clerk's interests. It is even possible that, during the time we are working for you, an existing or future client may seek to engage us in connection with an actual or potential transaction or pending or potential litigation or other dispute resolution proceeding in which such client's interests are or potentially may become adverse to the City Clerk's interests.

Jones Day cannot enter into this engagement if it could interfere with our ability to represent existing or future clients who develop relationships or interests adverse to the City Clerk. We therefore ask the City Clerk to confirm that Jones Day may continue to represent or may undertake in the future to represent any existing or future client in any matter (including but not limited to transactions, litigation or other dispute resolutions), even if the interests of that client in that other matter are directly adverse to Jones Day's representation of the City Clerk, as long as that other matter is not substantially related to this or our other engagements on behalf of the City Clerk. In the event of our representation of another client in a matter directly adverse to the City Clerk, however, Jones Day lawyers or other service providers who have worked with the City Clerk will not work for such other client, and appropriate measures will be taken to assure that proprietary or other confidential information of a non-public nature concerning the City Clerk acquired by Jones Day as a result of our representation in this matter will not be transmitted to our lawyers or others in the Firm involved in such matter.

In other words, we request that the City Clerk confirm that (1) no engagement that we have undertaken or may undertake on behalf of the City Clerk will be asserted by the City Clerk either as a conflict of interest with respect to, or as a basis to preclude, challenge or otherwise disqualify Jones Day from, any current or future representation of any client in any matter, including without limitation any representations in negotiations, transactions, counseling or litigation adverse to the City Clerk, as long as that other matter is not substantially related to any of our engagements in this matter, (2) the City Clerk hereby waives any conflict of interest that exists or might be asserted to exist and any other basis that might be asserted to preclude, challenge or otherwise disqualify Jones Day in any representation of any other client with respect to any such matter, (3) the City Clerk has been advised by Jones Day, and has had the opportunity to consult with other counsel, with respect to the terms and conditions of these provisions and their prospective waiver, (4) the City Clerk's consent to these provisions is both voluntary and fully informed, and (5) the City Clerk intends for its consent to be effective and fully enforceable, and to be relied upon by Jones Day.

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4. Compensation and Disbursements

Our fees are generally determined by the time devoted by each lawyer or other service provider involved in the engagement and the hourly billing rates assigned to each such person. Although Jones Day normally charges its hourly rates for lawyers who work on a matter, we have agreed that, at the present time, Jones Day will charge the City Clerk an hourly rate of \$495.00 for all attorneys who work on this matter. We submit periodic billing statements (generally monthly), which are due and payable upon presentation. We ordinarily require a retainer at the commencement of any relationship, which we will apply to any unpaid fees, disbursements and charges. We have, however, agreed to waive that requirement with respect to the City Clerk. Unless we specifically agree, any fee estimate that we may provide is not a commitment to perform the services within a fixed time or for a fixed fee.

In addition to our fees, we expect our clients to defray certain costs and expenses incurred during our representation of them. A description of our Disbursements and Charges Billing Policies is enclosed. Please note that although our charges for non-cash costs incurred by the Firm reflect our good faith estimate of our actual, fully absorbed, out-of-pocket costs, those estimates may differ from our actual costs. Normally, disbursements and charges will be subject to reimbursement from the City Clerk in the regular billing cycle. In some circumstances, however, such as in the case of particularly large items, we may ask the City Clerk to pay these items directly or in advance.

5. Audit Letter Issues

We further want to advise you that, in responses to any of your requests to provide information to your auditors, our policy is to comply with the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information regarding the scope and content of such responses, except when such Policy is clearly inapplicable.

6. Procedures upon Termination; Return of Documents; Intellectual Property

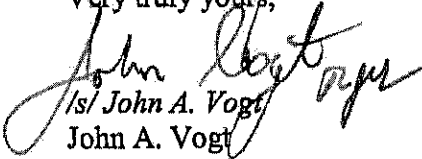
Unless previously terminated, our representation of the City Clerk will terminate upon our sending the City Clerk our final statement for services rendered in this matter. In that case, or otherwise at your request, any papers and property sent by you to us will be returned to you. Our own files pertaining to the matter, including lawyer work product and administrative records, as well as document copies, will be retained by the Firm in accordance with our document retention policy. All documents retained by the Firm will be transmitted in the ordinary course to the person responsible for administering our records retention program. Subject to our obligations under the bar requirements applicable attorneys admitted to the California bar, we reserve the right to destroy or otherwise dispose of any documents or other materials, including electronic versions, retained by us after the termination of the engagement.

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All intellectual property and other know-how developed by us in connection with this engagement, including subject matter expertise, whether or not preserved in written or electronic form, may be retained by us and used in connection with engagements on behalf of other clients, so long as no confidential information relating to the City Clerk is thereby disclosed.

Please sign and return to us the enclosed copy of this letter in order to confirm that it accurately reflects the scope, terms and conditions with respect to this engagement. If you would like to discuss any of these matters, please give me a call.

Very truly yours,


/s/ John A. Vogt
John A. Vogt

On behalf of the City Clerk of the City of Costa Mesa in her official capacity, the undersigned confirms that this letter accurately reflects the scope, terms and conditions with respect to this engagement and that the undersigned's execution and delivery of this confirmation on behalf of Costa Mesa has been duly authorized by Costa Mesa.

Dated: _____

Signature: _____

Name: Thomas P. Duarte, Esq

Title: City Attorney